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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
BEEHIVE TELEPHONE COMPANY, INC.) CC Docket No. 98-238
BEEHIVE TELEPHONE, INC. NEVADA)
)
Tariff F.C.C. No. 1) Transmittal No. 14
)
To: The Chief, Common Carrier Bureau

PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. ("Beehive Utah") and Beehive Telephone, Inc. Nevada ("Beehive Nevada"), by their attorney, and pursuant to section 405(a) of the Communications Act of 1934, as amended ("Act"), hereby petition the Common Carrier Bureau ("Bureau") to reconsider its *Order*, DA 98-2583, 1998 WL 889411 (Dec. 22, 1998) in the above-captioned proceeding. As parties to the proceeding, Beehive Utah and Beehive Nevada (collectively "Beehive") have standing to seek reconsideration. *See* 47 U.S.C. § 405(a).

Incorporated herein by this reference is the Reply to AT&T's Petition to Reject or, in the Alternative, Suspend or Investigate ("Reply") that Beehive filed on December 21, 1998, in defense of its Transmittal No. 14. When it rejected Transmittal No. 14 in part, the Bureau made note of the Reply, *see Order* at 1, but it did not address the merits of Beehive's arguments or resolve the issues raised. *See id.* at 2-3. At the very least, Beehive was entitled to a brief statement of the grounds on which its arguments were rejected, *see* 5 U.S.C. § 555(e), sufficient to enable a reviewing court to evaluate the Bureau's rationale at the time of its decision. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). Therefore, Beehive respectfully requests the Bureau to reconsider the Reply and provide a reasoned (albeit brief) explanation for its disposition of the issues

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Beehive raised.

The Bureau also needs to explain its rejection of Beehive's proposed revisions to its local switching and transport interconnection charge ("TIC") rate elements. Beehive believed that its revisions were in accordance with the Commission's last rate prescription. *See Beehive Tel. Co., Inc.*, FCC 98-320, 1998 WL 827399 (Dec. 1, 1998), *petition for reconsider. pending* ("*Rate Prescription III*"). The Bureau simply stated that Beehive's contention (expressed in Transmittal No. 14) that it was complying with *Rate Prescription III* was "without basis." *Order* at 2-3. That statement is not self-explanatory, especially in light of the Commission's express directive in *Rate Prescription III*.

The Commission directed Beehive "to use the premium access rates set forth by NECA in its Tariff F.C.C. No. 5 (effective July 1, 1998) for its tandem switched transport facility, tandem switched termination, and TIC charges." *Rate Prescription III*, at 9. It also allowed Beehive "to charge a TIC based upon rate band 3, the highest rate allowed." *Id.* at 9 n.31. The Commission did not require or authorize Beehive to use NECA's non-premium TIC rate (or any TIC rate other than NECA's premium rate band 3). Because NECA had no non-premium tandem switched transport facility or transport termination rate on July 1, 1998, and since it could not use NECA's non-premium TIC rate, Beehive read *Rate Prescription III* to require it to delete its non-premium access rates. That interpretation may not be what the Commission intended (but did not adequately express), but a *possible* misinterpretation of *Rate Prescription III* does not render Beehive's rate revision subject to rejection by the Bureau.

As Beehive argued, the Commission's power to reject a tariff is limited to those that are a patent "nullity as a matter of substantive law." Reply at 3 (quoting *American Broadcasting Cos.*,

Inc. v. FCC, 663 F.2d 133, 138 (D.C. Cir. 1994)). The Bureau could not find that Beehive's rate revision was a "nullity" under existing law, when Beehive based Transmittal No. 14 on its interpretation of the Commission's explicit language in *Rate Prescription III*. That being the case, it was for the Commission -- not the Bureau -- to determine whether Beehive correctly interpreted *Rate Prescription III*.

The substantive law also cannot support a holding that Beehive's proposal to use NECA's premium local switching and tandem switching rates was a "nullity." Unlike its previous rate prescriptions, the Commission did not develop rates in *Rate Prescription III* based on its calculation of Beehive's interstate revenue requirement. *Compare, e.g., Beehive Tel. Co., Inc.*, 13 FCC Rcd 2736, 2748, *reconsider. denied*, 13 FCC Rcd 11795 (1998), *petition for review filed, Beehive Tel. Co., Inc. v. FCC*, No. 98-1293 (D.C. Cir. June 30, 1998). It simply directed Beehive to use NECA's July 1, 1998 transport rates, which were presumably based on NECA's projections of costs and estimates of traffic and revenue for the test year July 1, 1998 through June 30, 1999. *See Reply at 5*. If one assumes that the prescribed NECA rates are targeted to allow Beehive to meet its revenue requirement, then *Rate Prescription III* guaranteed Beehive a revenue short fall -- unless it was allowed to use NECA's premium local switching and tandem switching rates.

As Beehive has demonstrated, its currently prescribed premium local switching rate (developed on an estimated total interstate revenue requirement of \$824,963) is 38% lower than the lowest NECA premium switching rate. *See Petition for Reconsideration*, CC Docket No. 98-108, at 23 (Dec. 31, 1998) ("Petition"). Again assuming the reasonableness of the prescription of the NECA transport rates, which reflect a total revenue requirement of \$2,333,937 based on Beehive's usage, the prescribed (substantially lower-than-NECA's) switching rates will result in a substantial

under recovery. *See* Petition at 23. Indeed, Beehive projects that its Commission-prescribed rates will produce losses in 1999 that will exceed \$1.294 million. *See id.* at 18.

The Commission could not have intended that Beehive be permitted to charge NECA's premium transport rates, including NECA's highest premium TIC rate, while being limited to charging local switching rates that are 38% lower than NECA's lowest switching rates. That makes no sense from a ratemaking standpoint. Thus, Beehive should have been permitted to revise its rates to conform to the NECA July 1, 1998 rates prescribed in *Rate Prescription III*. Regardless, Beehive's interpretation of *Rate Prescription III* could not be deemed so unreasonable as to make its attempt to revise its switching rates subject to rejection by the Bureau under delegated authority.

Beehive seeks reconsideration to afford the Bureau the requisite opportunity to pass on the issues, see 47 C.F.R. § 405(a), and to correct its errors. *See Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997). However, having been given that opportunity, the Bureau could refer this petition to the Commission for consolidated disposition with Beehive's petition for Commission reconsideration of *Rate Prescription III*. *See Arizona Mobile Tel. Co.*, 66 FCC 2d 691 (1977). The issue of the Bureau's authority to reject Beehive's tariff filings is squarely presented on reconsideration of *Rate Prescription III*. *See* Petition at 3-5.

For all the foregoing reasons, Beehive respectfully requests that the Bureau reconsider its *Order* or refer this matter to the Commission for disposition as requested herein.

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Respectfully submitted,
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By



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CERTIFICATE OF SERVICE

I, Paula L. Rogers, a secretary in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 21st day of January, 1999, had a copy of the foregoing PETITION FOR RECONSIDERATION hand-delivered to the following:

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